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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MEMPHIS FIRE DEPARTMENT and
FIREFIGHTERS LOCAL UNION NO. 1784,

Petitioners,

v.

CARL W. STOTTS, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

This case presents questions concerning the modification of a consent decree in an employment discrimination lawsuit.

In 1977, respondent Carl W. Stotts filed a class action lawsuit against the City of Memphis, alleging that the Fire Department's hiring and promotion policies were racially discriminatory. Following three years of discovery and negotiations, the lawsuit was settled by the entry of a consent decree.

The consent decree was agreed to by a class of black employees of the Memphis Fire Department and the City of Memphis and approved by the district court on May 27, 1980. The express purpose of the consent decree was "to remedy the past hiring and promotion practices of the Memphis Fire Department with respect to the employment of blacks[1/] and [to] continue[ing] the efforts

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1/ Petitioners correctly state that there was no finding of liability on the part of the Memphis Fire Department in the consent decree. They fail to note, however, that the undisputed statistical evidence before the district court created such a strong prima facie case of racial discrimination that the court took judicial notice of the discriminatory prac-

made by the City in hiring and promotions under the consent decree entered in CA-74 -286."[2] A. 64.[3] In order to accomplish

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1/ continued

tices of the City. A. 21. See also A. 9-11, 70-71 for hiring and promotional statistics showing that blacks remained seriously under-represented in job classifications above the rank of private in 1981. Also before the court were depositions of black firefighters detailing other discriminatory employment practices in disciplinary treatment, training opportunities, and station segregation by race.

2/ In 1974 the City of Memphis and the U.S. Department of Justice entered into a consent decree resolving issues raised in a lawsuit which had alleged discrimination on the basis of race and sex in hiring and promotion within the various divisions of city government. In this decree the City committed itself to an interim goal of filling at least fifty percent (50%) of all vacancies with qualified black applicants and meeting exactly the same long term goal of achieving a proportional representation of blacks in each job classification as in the 1980 decree.

3/ "A." refers to the appendix filed by the petitioner Firefighters Local Union No. 1784 in No. 82-206. We are filing a consolidated brief in opposition to certiorari pursuant to the Clerk's approval in his letter dated August 30, 1982. We, therefore, will only refer to the appendix filed in No. 82-206 unless otherwise noted.

this purpose the Fire Department agreed inter alia to the long term goals of "rais[ing] the black representation in each job classification in the fire department to levels approximating the black proportion of the civilian labor force in Shelby County." A. 64. Moreover, the district court expressly retained jurisdiction of the case "for such further orders as may be necessary or appropriate to effectuate the purposes of this decree." A. 69.

In April of 1981, the City experienced an unanticipated economic crisis that required layoffs and demotions in city departments. A layoff policy was formulated that provided: (1) the Mayor of Memphis had absolute discretion in approving or not approving the job classification to be eliminated; (2) affected employees in these job classifications were to be laid off or reduced in rank according to their city-wide seniority; (3) under the

the policy certain employees whose positions were being eliminated possessed "bumping" rights whereby employees with sufficient seniority could choose to temporarily assume a lower ranking position rather than go on layoff status, and (4) excess employees who had been "bumped" could exercise their seniority resulting in the least senior employees being laid off. It is undisputed that "the application of the layoff policy to the [Fire Department] job classifications selected by the City would have virtually destroyed the progress belatedly achieved through affirmative action."[4/] A. 32.

After respondents applied for and were granted a temporary restraining order re-

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4/ For example, both courts below found that approximately 55% of black lieutenants and 46% of black drivers would either have been laid off or demoted if the City's layoff policy was applied. A. 9. These were the job classifications where blacks had made recent gains after years of virtual exclusion. See A. 9-11, 37.

straining the City from laying off or reducing in rank any black employee in the Memphis Fire Department, the district court held an evidentiary hearing and enjoined the City in orders issued on May 8, 1981, and June 24, 1981, from implementing any layoff policy based upon seniority insofar as it would decrease the percentage of blacks in 7 job classifications in the Memphis Fire Department.[5/] The City then proposed and the district court

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5/ The Union appealed only from the injunction entered on May 8, 1981, since the additional reductions enjoined on June 25, 1981 affected only employees who are not represented by the Union.

It is respondent's position that the Union's seniority provision in the Memorandum of Understanding (A. 80-82) is void and unenforceable under Tennessee law. Although the Sixth Circuit did not decide this issue (Pet. App. 38), the Union continues to seek to enforce the seniority provision in its petition. Subsequent to the Sixth Circuit's opinion on May 7, 1982, respondents discovered that Local 1784 argued that the Memorandum of Understanding is illegal and therefore a third party could not sue the Union for damages as a result of a 1978 strike by the Union. The Tennessee Court of Civil Appeals

approved layoffs and demotions that included a proportionate number of blacks and whites.[6/]

Both the City and the Union appealed, and the Sixth Circuit affirmed the judgment of the district court in modifying the consent decree in order to obtain its stated purpose and to preserve black representation in the Fire Department.

5/ continued

upheld the Union's position in Fulenwider v. Firefighters Association Local Union 1784, ____ S.W.2d ____ (Tenn. App. 1981). See also City of Chattanooga v. Chattanooga Firefighters Ass'n Local 820, ___ S.W.2d ____ (Tenn. App. 1980); Jackson Transit Authority v. Local 1285, 50 U.S.L.W. 4603 (June 7, 1982). The Union should therefore be precluded from arguing the enforceability of its contractual rights when it has taken a prior inconsistent position. See 1 B Moore's Federal Practice ¶ 0.405[8] at 765-55 (2d ed. 1974).

6/ The total number of employees laid off and demoted were 72 whites and 8 blacks. All laid off employees were reemployed by November 1981. The Fire Department made new promotions in June 1982 and expects to hire a new class of 30 firemen in the late fall of 1982.

REASONS FOR DENYING THE WRIT

The petitioners state the question presented in terms of the abrogation of a bona fide seniority system where no finding of discrimination has been made. The district court and the Sixth Circuit, however, considered these subsidiary issues in the decisions below and instead defined the issue as the extent of a court's power to enjoin layoffs and demotions that would drastically impair the relief mandated by the consent decree. We therefore respectfully assert that the question presented is:

> Whether a district court has exceeded the limits of its power to modify a consent decree to prevent minority employment from being affected disproportionately by unanticipated layoffs and demotions and thus preserve the level of benefits procured through the decree?

I. The Decision of The Sixth Circuit, Modifying The Consent Decree, Is Consistent with The Decisions of This Court And Other Circuits.

The Court of Appeals has written a

thorough opinion that relies on the power of the Court to enjoin a layoff and demotion policy based upon seniority that conflicts with the Fire Department's duty under a consent decree to remedy serious black under-representation. In doing so the Court's opinion is consistent with opinions in other recent cases in which this issue was presented.[7/] Petitioners argue that this Court has not decided the issue of how a bona fide seniority system can be modified to maintain gains made under affirmative action plans or decrees, yet in Franks v. Bowman Transportation Company, 424 U.S. 747 (1976), seniority was not found to be immutable under 703(h) but was subject to alteration in the collective bargaining process:

> The Court has also held that a collective bargaining agreement may

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7/ See Boston Chapter NAACP v. Beecher, 679 F.2d 965 (1st Cir. 1982), cert. pending; Morgan v. O'Bryant, 671 F.2d 23 (1st Cir. 1982), cert. denied, ___ U.S. ___; Brown v. Neeb, 644 F.2d 551 (6th Cir. 1981).

> go further, enhancing the seniority status of certain employees for purposes of furthering public policy interests beyond what is required by statute, even though this will to some extent be detrimental to the expectations acquired by other employees under the previous seniority agreement. Ford Motor Co. v. Huffman, 345 U.S. 330 (1953). And the ability of the union and the employer voluntarily to modify the seniority system to the end of ameliorating the effects of past racial discrimination, a national policy objective of the highest priority, is certainly no less than in other areas of public policy interest.

424 U.S. at 778. See also, Tangren v. Wackenhut Services, Inc., 658 F.2d 705 (9th Cir. 1981), cert. denied 50 U.S.L.W. 3802 (April 5, 1982).

In this case a municipal employer who had sole authority[8/] to determine the method of layoff and demotion, voluntarily entered into a consent decree that mandated affirmative relief to a class of black employees and appli-

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8/ See fn. 4, supra.

cants. By adopting a seniority-based layoff policy, the Fire Department acted contrary to the purpose of the consent decree: remedial hiring and promotion of black employees to remedy the past hiring and promotion practices of the Memphis Fire Department. Under such circumstances the district court's holding correctly exercises the court's authority to insure that its Orders, whether entered by consent or not, are obeyed, and their purposes achieved. United States v. Swift and Company, 286 U.S. 106 (1932); United States v. United Shoe Machinery Company, 391 U.S. 244 (1968); King Seely Thermos Company v. Alladin Industries, Inc., 418 F.2d 31 (2nd Cir. 1969); EEOC v. Plumbers & Pipefitters, Local 189, 438 F.2d 408 (6th Cir. 1971); United States v. Hall, 472 F.2d 261 (5th Cir. 1972).

It should be recalled that the section of Title VII which accords a measure of immunity to bona fide seniority systems, § 703(h), merely helps define what is and what is not a

violation of the Act. Franks v. Bowman, 424 U.S. 747, 758 (1976). Thus, in every case in which this Court ruled regarding a seniority system that is claimed to be bona fide, it was addressing the question of whether or not a violation of the Act has been established. See Teamsters v. United States, 431 U.S. 324 (1977); California Brewers Ass'n v. Bryant, 444 U.S. 598 (1980); American Tobacco Co. v. Patterson, ___ U.S. ___, 102 S.Ct. 1334 (1982); Pullman Standard v. Swint, ___ U.S. ___, 102 S.Ct. 1781 (1982). Here, we are concerned with the question of whether or not a remedial order may require departures from the routine operation of an arguably bona fide seniority system. Where the contours of such remedial orders are involved this Court has repeatedly approved alteration of those seniority rules. See Franks v. Bowman, supra, and Zipes v. TransWorld Airlines, ___ U.S. ___, 50 U.S.L.W. 4238 (February 24, 1982).

See also, Morgan v. O'Bryant, 671 F.2d 23 (1st Cir. 1982), cert. denied, ___ U.S. ___. In temporarily modifying a consent decree by altering a seniority-based method, the district court did the minimum necessary to maintain the status quo for gains made under the provisions of the 1980 decree. The district court's proportional layoff and demotion order "does not require the discharge of white employees and their replacement with new black hires." United Steelworkers of America v. Weber, 443 U.S. 193 (1981). Rather, when a reduction in force is necessary it requires that black employees will remain at specific levels in the Fire Department until the ultimate goal of the consent decree is attained: representation of blacks in each job classification in proportion to their numbers in the labor force. Seniority is only modified to the extent that blacks do not suffer disproportionately from the layoffs.

II. The Decision of The Court of Appeals Is Supportive of The Congressional Policy Encouraging Settlement In Employment Discrimination Litigation.

Both the district court and the Court of Appeals sought a modification of the decree which would allow the City to proceed with its layoff policy, subject only to a reasonable deference to its obligations under the decree. In so doing, the district court, working within the context of a voluntary agreement, the implementation of which it had overseen and ordered, achieved a modification which partially alleviated the City's fiscal constraints, while protecting the integrity of the court's order.

Such a procedure, particularly in the face of changed and unforseen circumstances is in no way likely to inhibit the future use of consent decrees in Title VII litigation. First, the entire thrust of the district court's modification was to insure that the purpose of the decree, as explicitly stated

in the decree, was fulfilled.[9] Second, the parties to the decree explicitly indicated the continuing jurisdiction of the court to issue" ... such further orders as may be necessary or appropriate to effectuate the purposes of this decree".[10] This can only be interpreted as acknowledging the power of the court to modify the decree and to grant additional relief not embodied in the decree, if it were necessary in order to obtain the purposes of the decree.[11]

It follows that in this instance the court, faced with an action which threatened to both violate the decree and nullify its past effects, appropriately moved to protect the integrity of its orders, as a court of equity may, whether or not the power to modify

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9/ See, Consent Decree § V., A64.

10/ See, Consent Decree § VII., A69.

11/ Roberts v. St. Regis, 653 F.2d 166, 172 (5th Cir. 1981).

the injunction is reserved by its terms. United States v. Swift and Company, supra.

Far from inhibiting settlements, actions such as these which consider the concerns of all parties and the purpose and context of the agreement,[12] insure that a consent decree pursuant to Title VII may, if necessary, be modified fairly to maintain its integrity while balancing the interests of the parties.[13]

12/ See e.g., United States v. ITT Continental Baking Co., 420 U.S. 223, 238 (1975); Eaton v. Courtaulds of North America, Inc., 578 F.2d 87, 91 (5th Cir. 1978).

13/ The petitioners argue that the modification of the consent decree if allowed to stand would undermine incentives for settling employment discrimiation cases where seniority rights are at issue. Yet one of these petitioners, the City of Memphis, approved a consent decree governing its utility division that included this provision:

> (c) Defendants agrees that, in the event of layoff or reduction in force, all reasonable steps will be taken to minimize the effect of such actions on the achievement of the goals of this Decree. MLGW shall notify counsel for the plaintiffs forty-five (45) days in advance of

CONCLUSION

For all the foregoing reasons, the

13/ continued

> any proposed layoff or reduction in force, specifying those persons, by race and sex, to be affected by such action, whether to transfer, demotion, layoff or termination; and specifying the effect of the actions on the achievement of the long-term goals of the Decree. If such action will have a significant adverse effect o black or female employment in those areas subject to interim goals, MLGW shall indicate what alternatives to layoff or reduction were considered and the reason for rejection of these alternatives. If counsel for government or private plaintiffs object to the proposed action of MLGW, the parties shall meet prior to implementation of the proposal to attempt to resolve the disagreement. If agreement cannot be reached, the matter may be referred to the Court for resolution.

U.S. & Armmer v. Memphis Light, Gas & Water Division (MLGFW), Civil Action Nos. C-74-286, 74-17 (W.D. Tenn.), Amended Consent Decree entered November 14, 1980. Unlike the Fire Department where no layoffs or demotions had been made or even discussed prior to 1981, MLGW had considered layoffs in 1976 when the initial consent decree was entered into. See also, Tangren, supra.

petitions for a writ of certiorari should be denied.

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